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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

(3)

No. 84-1517

In the Matter of the Petition
of

THOMAS M. FAHEY, as Operator of Castle Rest Nursing Home,

Appellant,

v.

DAVID AXELROD, M.D., as Commissioner of Health of the State of New York,

Appellee,

For a Judgment Pursuant to CPLR Article 78.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

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POINT I

RESPONSE TO APPELLEE'S STATEMENT OF THE CASE

In his Statement of the Case, appellee correctly states that in 1966 appellant was established as a member of a partnership operating Castle Rest Nursing Home. He then states that: "When that partnership was dissolved, it became necessary for appellant to obtain Public Health Council approval for his establishment as a sole proprietor." (Mot. to Dismiss or Affirm, p. 2-3.) Appellant respectfully submits that appellee is wrong both on the facts and the law.

Appellee's characterization of the manner in which appellant came to be the sole proprietor of Castle Rest Nursing Home is, in point of fact, a mischaracterization. It glosses over the fact that the partnership was not voluntarily dissolved but was torn asunder by bitter and hotly contested litigation.

Further, establishment approval, once granted, does not become void by opeation of law, in the absence of some action taken by the person established to terminate that establishment. *Kupersmith v. Public Health Council,* 101 A.D.2d 918 (3d Dep't. 1984), aff'd. 63 N.Y.2d 904 (1984). Moreover, the New York Legislature has made explicit appellant's contention that establishment approval, as a member of a partnership, once granted, cannot be adversely affected by the ex parte actions of other partners, by amending Public Health Law §2801-a to provide that established partners need not reapply to the Public Health Council for establishment approval upon a change in the partnership which is the operator of a hospital (a nursing home is defined as a hospital under New York law). Public Health Law §2801-a.4.(b), as amended L. 1984, c. 969§2, eff. Aug. 6, 1984 (McKinney's Consolidated Laws of New York, Interim Annotation Service, April, 1985, p. 935.)

In view of the foregoing, appellant respectfully submits that his contention that New York law recognizes a property right in nursing home licensure which is protected by the Due Process Clause is fortified by *Kupersmith v. Public Health Council, supra.,* and by this recent change in the statute referred to by appellee.

Finally, appellant respectfully submits that *Spiegel v. Whalen,* 44 N.Y.2d 746 (1978) and *Hollander v. Whalen,* 68 A.D.2d 990 (3d Dep't. 1979) cited by appellee as being relied on by the Administrative Law Judge (Mot. to Dismiss or Affirm, p. 8), as well as references to appellant's conviction for income tax evasion (*Id.*, at 3) are nothing more than red herrings. Not only were Messers Spiegel and Hollander convicted of felonies arising out of the operation of their respective nursing homes, but

the holding in *Spiegel, supra.,* ie that Mrs. Spiegel, as surviving partner, was required to apply for establishment approval as a sole proprietor was rendered highly dubious by *Kupersmith, supra.,* and legislatively overruled by the recent amendment to Public Health Law §2801-a.4.(b) discussed above. *Hollander, supra.,* merely held that procedings would not lie to revoke the establishment approval of an operator who was convicted before he had been issued an operating certification.

In any event, the crime for which the appellant was convicted was not the basis for the underlying administrative proceedings, and could not be. Under New York law tax evasion is not a felony, and the Supreme Court of the state of New York so held in *Axelrod v. Fahey,* ———Misc. 2d———(Sup. Ct. Onondaga Co., 1/31/85, reproduced at A1).

POINT II

RESPONSE TO APPELLEE'S STATEMENT OF THE REASONS FOR GRANTING THE MOTION

While appellee concedes that in an appropriate case the jurisdiction of this Court on appeal may be exercised to determine the validity of a statute or rule, it would appear that he contends that appellate jurisdiction does not extend to this case because appellant, "merely challenges action taken by the Administrative Law Judge under authority of an enabling statute." (Mot. to Dismiss or Affirm, p. 2).

As *Bodie v. Connecticut,* 401 U.S. 371 (1971) points out, there have been many instances when this Court has applied constitutional scrutiny to a facially valid and apparently neutral statute or rule which, as applied in a particular case, or to a particular person or class, has resulted in a deprivation of due process. *Id.*, at 379.

What the Due Process Clause requires is the opportunity to be heard, granted at a meaningful time and in a meaningful manner. While a litigant who, having been afforded such opportunity, violates, without justifiable excuse, a procedural rule or a rule for the production of evidence, has not been denied due process, *Bodie v. Connecticut, supra.*, the litigant who suffers the manipulation of a staute or rule to deprive him of property without a meaningful opportunity to be heard may invoke the jurisdiction of this Court.

Windsor v. McVeigh, 93 U.S. 274 (1876), relied on by appellee, is a case in point. Acting pursuant to a Civil War forfeiture statute, the federal government, in 1863, commenced a forfeiture action against property located within federal territory. The owner of the property sought to appear by an attorney and file an answer. The district court struck the answer, because the owner defendant was then a resident of the city of Richmond, then Confederate territory, and upon his default, a judgment of forfeiture was entered.

After the war, the former owner commenced an action to recovcer his land. On appeal of an adverse judgment in that action to this Court, it was observed that a sentence of a court pronounced against a party without hearing him, or giving him an opportunity to speak, is in fact a mere arbitrary edict, clothed in the form of a judicial sentence, about which it is difficult to speak with moderation. *Id.*, at 277-278.

Appellant respectfully submits that it is also difficult to speak with moderation about the entry of a default and summary judgment against appellant in the underlying administrative proceeding under the circumstances of this case, wherein counsel for appellant was actually engaged in another forum, pursuant to the return date set in a court order.

CONCLUSION

For the reasons given above, this Court should deny appellee's motion to dismiss or affirm and should note probable jurisdiction of this appeal.

Respectfully submitted,

MAY 31, 1985
~~June~~ , 1985

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APPENDIX A

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ORDER OF HON. J. ROBERT LYNCH
dtd. 1/31/85 (Axelrod v. Fahey).

On the return date set forth in the said Order to Show Cause, the petitioner having appeared by Michael J. Hungerford, Assistant Attorney General, and the respondent having appeared by Dante M. Scaccia, Esq., and in person, and this matter having duly come on before the Court to be heard, the Court having heard oral argument in support of the petitioner's application and in opposition thereto, reserved decision,

The Court, having, on January 9, 1985, rendered a decision in writing, finding and concluding that the appointment of a receiver was mandated by paragraph (a) of subdivision 2 of Public Health Law §2810, working in conjunction with Public Health Law §2806.5(a), by reason of the fact that the respondent had been convicted of federal income tax evasion, directed the appointment of a receiver and that, in the event that the parties could not agree to the rent to be paid to the respondent pursuant to Public Health Law §2810, a hearing be held to determine the amout of such rent,

The respondent having, on January 23, 1985, applied for reconsideration of the Court's decision upon the ground that the mandatory language of Public Health Law §2810.2(a) is not made applicable to this proceeding, in conjunction with Public Health Law §2806.5(a), by reason of the fact that the offense of which the respondent was convicted is not a felony under New York law, and therefore the provisions of Public Health Law §2806.5(a) are not applicable to the respondent herein,

The Court having treated the respondent's said application as an application for leave to reargue, and having considered said application based upon the Order to Show Cause, Petition and supporting papers above mentioned, and the Answer and supporting papers above mentioned, hereby grants leave to reargue and hereby finds and concludes as follows:

(1) That the respondent's conviction for federal income tax evasion would not be a felony in New York;

ORDER OF HON. J. ROBERT LYNCH
dtd. 1/31/85 (Axelrod v. Fahey).

(2) That the mandatory language of Public Health Law §2810.2(a), read in conjunction with Public Health Law §2806.5(a), has no application to this proceeding;

(3) That a hearing should be held pursuant to Public Health Law §2810.2(a) to determine whether there is a need for the appointment of a receiver for the said facility;

(4) That pursuant to Public Health Law §2810, such hearing is to take precedence over every other business of the Court, and that the undersigned is not scheduled to preside as Justice of the Supreme Court, Onondaga County, at Syracuse until April, 1985;

And the Court having discussed the disposition of such hearing with the Hon. William R. Roy, Administrative Justice for the Supreme Court, Fifth Judicial District, it is

ORDERED that pursuant to Public Health Law §2810 a hearing be held to determine whether the appointment of a receiver for Castle Rest Nursing Home is necessary, and it is further

ORDERED that in the event that the parties so stipulate, the Hon. Richard Aronson, Justice Ret., be and the same hereby is appointed as Judicial Hearing Officer to conduct said hearing pursuant to Public Health Law §2810, and it is further

ORDERED that, in the event that the parties are unable to so stipulate, this matter be referred to the calendar justice for the Supreme Court, Onondaga County.

Dated: Lowville, New York
January 31, 1985.

ENTER S/J. Robert Lynch, J.S.C.

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ORDER OF HON. J. ROBERT LYNCH
dtd. 1/31/85 (Axelrod v. Fahey).

I the undersigned, an Attorney at Law, DO HEREBY CERTIFY pursuant to Section 2105 CPLR that I have compared the foregoing copy with the original and have found it to be a true and complete copy thereof, the original having been filed in the Office of the Clerk of Onondaga County, New York, on the 5th day of February, 1985.

Dated: February 5, 1985.

S/ Robert A. Traylor